

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF MISSOURI  
EASTERN DIVISION

JANE DOE I, <i>et al.</i> ,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	No. 4:08-cv-1518 CEJ
	)	
CHRIS KOSTER, <i>et al.</i> ,	)	
	)	
Defendants.	)	

**MOTION FOR RECONSIDERATION**

Come now Plaintiffs, pursuant to Fed.R.Civ.P. 54(B), and respectfully move this Court for reconsideration of its September 25, 2009 order (Doc. # 222). In support, Plaintiffs state:

1. On September 25, 2009, this Court entered an order granting the motion to abstain filed by Defendants Robert McCulloch and Tim Fitch. (Doc. #222). In the same order, this Court denied “all other pending motions in this action.” The pending motions include Plaintiffs’ fully briefed Second Motion for Preliminary Injunction. (Doc. # 179).

2. Plaintiffs respectfully suggest this Court should reconsider its decision to abstain for the following reasons:

A. Although the parties agree that the provisions of § 589.426(1) and § 589.426(2) are unclear, the case before the Supreme Court of Missouri will clarify the provisions of neither;

B. The case before the Supreme Court of Missouri is a criminal case involving one defendant, not a class or any of the Plaintiffs; accordingly, a determination that §

589.426 does not apply retrospectively in that case will not deprive these Plaintiffs of standing to make the same assertion on their behalf (although it would portend the result); and

C. Even if the Supreme Court of Missouri affirms in the case before it and further assuming, *arguendo*, such a ruling would make § 589.426 unenforceable against Plaintiffs, Plaintiffs' claims in this case will not be moot because Plaintiffs' Second Amended Complaint seeks nominal damages. Plaintiffs are entitled to an award of nominal damages if they can demonstrate their constitutional rights were violated on October 31, 2008 (or—absent injunctive relief on October 31, 2009). A party is entitled to an award of nominal damages when a constitutional right is violated because of the “importance to organized society that those rights be scrupulously observed.” *Carey v. Piphus*, 435 U.S. 247, 266 (1978); *see also Farrar v. Hobby*, 506 U.S. 103, 112 (1992) (“*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation of his [constitutional] right ... but cannot prove actual injury”). The Eighth Circuit recently reaffirmed that “nominal damages must be awarded when a plaintiff establishes a violation of the right to free speech.” *Lowry ex rel. Crow v. Watson Chapel School Dist.*, 540 F.3d 752, 762 (8th Cir. 2008)(*citing Risdal v. Halford*, 209 F.3d 1071, 1072 (8th Cir. 2000)). It is well established that nominal damages must also be awarded where a party has established a violation of the right to due process. *See Farrar v. Hobby*, 506 U.S. 103, 112 (1992),

3. In addition or in the alternative, Plaintiffs respectfully suggest this Court should reconsider its denial of Plaintiffs' Second Motion for Preliminary Injunction for the following reasons:

A. It will be impossible for a decision in the case pending before the Supreme Court of Missouri to be rendered before § 589.426 is subject to enforcement on October 31, 2009;

B. The Second Motion for Preliminary Injunction is fully briefed and opposed by less than one-third of Defendants;

C. The delay in this Court's decision to abstain from when the issue was first raised on October 21, 2008 (Doc. # 44) to when the decision was made more than eleven months later (Doc. # 222) deprives Plaintiffs of the opportunity to obtain a final, enforceable order from the Missouri courts before they are again subjected to enforcement of § 589.426; and

D. This Court has the authority to consider Plaintiffs' Second Motion for Preliminary Injunction even if this Court does abstain under *Pullman*.

Respectfully submitted,

**AMERICAN CIVIL LIBERTIES UNION OF  
EASTERN MISSOURI**

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served upon each of the Defendants listed below

by operation of this Court's ECF/CM system on October 6, 2009:

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